SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2008

THOMAS A. AYRE,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE CRIMINAL COURT OF
BALTIMORE CITY

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NO. _____

THOMAS A. AYRE,
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STATE OF MARYLAND,
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PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE CITY

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Criminal Court of Baltimore entered in the above entitled case on November 30, 1973.

OPINIONS BELOW

The judgment and opinion of His Honor, Judge Charles D. Harris in the Criminal Court of Baltimore entered on November 30, 1973 in Criminal No. 37301598 was done orally and has not been printed either in official reports or in a slip opinion and therefore is only available by transcript. This oral opinion found Petitioner guilty of violation of *Article 27, Section 418* of the *Annotated Code of Maryland*.

A Memorandum Opinion filed on November 5, 1973, had previously denied Petitioner's Motion to Dismiss. This opinion is set out as Appendix "A" herein.

The Petitioner made Application to the Court of Special Appeals for the State of Maryland for Writ of Certiorari on December 27, 1973 and Docketed as Miscellaneous No. 34, September Term, 1973. The Petitioner was informed by letter from the clerk on February 13, 1974 that the Petition was informally denied without comment on February 7, 1974. A check of the docket verified this denial.

The Petitioner then made Application to the Court of Appeals of Maryland on March 7, 1974 and Docketed as Miscellaneous No. 12, September Term, 1974. The Court of Appeals by written order dated April 11, 1974 denied the writ since:

> "... there has been no showing that review by certiorari is desirable and in the public interest."

Copy of this order is set out as Appendix "B" herein.

JURISDICTION

The judgment of the District Court of Maryland in Baltimore City was entered by His Honor, Judge Edgar P. Silver upon arrest warrant No. 150715 on August 9, 1973 finding Petitioner guilty of violating *Article 27, Section 418* of the *Annotated Code of Maryland* and imposing a fine of one hundred dollars and costs. Copy of charging document set out as Appendix "C".

The judgment of the Criminal Court of Baltimore (De Novo) was entered on November 30, 1973 by His Honor, Judge Charles D. Harris upon this same arrest warrant which was docketed as No. 37301598. This judgment found Petitioner guilty of the statutory violation and again imposed a one hundred dollar fine.

An Application for Writ of Certiorari was denied on February 7, 1974 without order, comment or opinion by the Court of Special Appeals of Maryland.

An Application for Writ of Certiorari was denied on April 11, 1974 by Order of the Court of Appeals of Maryland, and the judgment was thus final. *Chicago G.P.R. Company v. Basham*, 249 U.S. 164. The jurisdiction of this Court is invoked under *28 U.S.C. Section 1257.*

QUESTIONS PRESENTED

1. Can a charging document charge and cause a conviction upon a crime that is not within the statute compatible with the *Fourteenth Amendment?*

2. Must a charging document in obscenity cases at the minimum identify the type of material charged or the particular publication or title so as to provide adequate notice

to him so he may properly defend and plead acquittal or conviction in a subsequent prosecution under the *Fourteenth Amendment?*

3. Does a charging document become defective when it charges a crime but ends with "etc." meaning and others under the *Fourteenth Amendment?*

4. Must a state statute that fails to define conduct be authoritatively construed to contain the *Miller* specifically defined conduct in order to support a conviction under the *First* and *Fourteenth Amendments?*

5. Where a state statute fails to define the sexual conduct under *Miller* and where the State's highest Appellate Court has refused to construe the conduct into the statute by holding that the word obscene cannot be defined and no conduct was necessary in order to be obscene, is that statute unconstitutionally vague and overbroad under the *Fourteenth Amendment* in limiting *First Amendment* freedoms?

6. Where the statutory penalty provides for a sentence of one year imprisonment and one thousand dollars fine, must a jury trial be granted irrespective whether punishment was one hundred dollars fine in determining a petty offense under the *Sixth* and *Fourteenth Amendments?*

7. Does the statute deny to Petitioner the equal protection of the law under the Fourteenth Amendment where large classifications are totally exempt from obscenity charges whereas Petitioner is not making them unreasonable classifications?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* and the provisions of *Article 27, Section 417 et seq.* are set forth in Appendix "D" hereto.

STATEMENT OF THE CASE

The Petitioner was arrested on a warrant by Sergeant Donald Dougherty of the Baltimore City Police Department on July 9, 1973 for the sale of various obscene materials on June 26, 1973. The arrest was made upon an arrest warrant numbered 150715 issued by the District Court of Maryland, charging Petitioner 2 weeks previously with having;

> "Unlawfully & knowingly did possess obscene & indecent books, drawings, pamphlets, pictures, etc. with intent to sell in Baltimore City, St. of Md."

The Petitioner was tried on August 9, 1973, in the District Court of Maryland, before the Honorable, Judge Edgar P. Silver, and was found guilty and fined one hundred dollars and costs.

The Petitioner appealed to the Criminal Court of Baltimore and filed a Prayer for a Jury Trial. Trial in District Court is by a Judge only. Trial in Criminal Court is De Novo and juries are available.

On October 29, 1973, the Petitioner was called to trial before the Honorable, Judge Charles D. Harris and prior to

trial filed a Motion to Dismiss with a Memorandum of Points and Authorities in support of it, which is the proper way to test the sufficiency of the charging document. The Petitioner again stated his desire for a Jury Trial and objected to the Court for failure to permit one. Judge Harris denied trial by Jury since the lower Court sentence was not considered to be serious enough for the right to Trial by Jury. The authorized penalty for violation of *Article 27, Section 418* is one year imprisonment and $1,000.00 fine. A second conviction is punishable by 3 years and $5,000.00 fine.

The Petitioner presented argument to the Court upon his Motion to Dismiss. Judge Harris granted a continuance for the State to present opposing argument and for him to review the Motion and the brief.

On November 1, 1973, the State filed a Motion to Supplement the Record and filed the Application for Summons/Arrest Warrant which was granted. Judge Harris on November 5, 1973, filed a Memorandum Opinion Denying the Motion to Dismiss.

The matter was called to trial on November 30, 1973. The Petitioner renewed his request for Jury Trial and his Motion to Dismiss both of which were denied. A Motion for Judgment of Acquittal was made and denied at the conclusion of the State's case and renewed at the conclusion of the entire case. The Petitioner was again found guilty and the judgment and fine of the District Court of Maryland was adjudged.

A Petition for a Writ of Certiorari was filed in the Court of Special Appeals and Docketed as Miscellaneous No. 34,

September Term, 1973. On February 13, 1974, Petitioner's counsel received a letter dated February 11, 1974, from Julius A. Romano, Clerk, Court of Special Appeals of Maryland, stating that the Court denied the request on February 7, 1974, by endorsement upon the margin initialed by His Honor, Chief Judge Charles E. Orth, Jr.. A check of the Clerk's records revealed this Petitioner was in fact denied on that date without comment.

A Petition for Writ of Certiorari was then filed in the Court of Appeals of Maryland and Docketed as Miscellaneous No. 12, September Term, 1974. The Court by written Order on April 11, 1974 denied the Writ as it was not shown to be desirable and in the public interest. See Appendix "B".

HOW FEDERAL QUESTIONS ARE PRESENTED

Under Maryland statutes (*Article 26, Annotated Code of Maryland*) the District Court has jurisdiction of all misdemeanors (the offense at issue is a misdemeanor) regardless of penalty which are triable only by a Judge.

The Petitioner filed an oral Motion to Dismiss which was denied. An appeal was filed to the Criminal Court of Baltimore. This trial is de novo with panels available for jury trials. There are no appeals from this trial as a matter of right.

On behalf of Petitioners the following points were raised prior to trial by Motion to Dismiss in the Criminal Court of Baltimore: a) the statutory provisions as written, construed and applied were void for impermissible vagueness and overbreadth contrary to the *First, Fourth, Fifth, Sixth* and

Fourteenth Amendments; b) the denial of equal protection of the laws since arbitrary classifications permit improper exemptions; c) that the statutory provisions as written failed to conform to *Miller* standards of conduct and had not been so construed; d) the trial proceedings created an ex post facto enforcement of the pre-existing statute; e) that the charging document failed to specify what crime he was charged with and what material was being charged against him; f) that the charging document failed to inform him of what he was called upon to defend in order to prepare therefore and to plead acquittal or conviction in bar to any subsequent prosecutions which denied to him due process of the laws; g) that the statute failed to properly warn him of what actions on his part would come within the proscription of the statute.

At trial the Petitioner moved for Judgment of Acquittal citing the above reasons together with the fact that the crime charged was not a crime under the statute.

The pre-trial Motion to Dismiss was denied by Judge Harris in a written opinion on November 5, 1973 and the Motion is set forth as Appendix "A" herein. Post trial motions were denied orally by Judge Harris including failure to convict him of a crime.

A timely Application for Writ of Certiorari to the Court of Special Appeals was taken from the judgment of Judge Harris. This application preserved the federal constitutional questions for review by that Court. The Court of Special Appeals denied this application without written order or opinion.

A timely Application for Writ of Certiorari was taken to the Court of Appeals. This application preserved the federal constitutional questions for review also by that Court. The Court of Appeals entered an Order on April 11, 1974 stating that there was no showing that review by certiorari is desirable and in the public interest.

REASONS FOR GRANTING THE WRIT

1. The charging document was void for failure to set forth the essential elements and failed to charge a cognizable crime and Petitioner was not convicted of a cognizable crime under *Article 27, Section 418*, of the *Annotated Code of Maryland*, contrary to the *Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States*.

The arrest warrant upon which the Petitioner was tried charges him with possessing multiple unnamed materials "with intent to sell".

The statute, in respect to possession, does not proscribe such activity but only prohibits possession with intent to "distribute". The term distribute for purposes of the statute is defined under *Section 417* as "to transfer possession of whether with or without consideration". See Appendix "D".

The statute was amended on June 1, 1967 and charged distribution only as a possessory crime by transfer of it which covered those instances where delivery was affected only. Possession for purposes of sale was repealed. Delivery or the intent to deliver to another becomes the essence of the crime. In fact the statute specifically bars sending or causing to be

sent into the State of Maryland for "sale or distribution" which recognizes a difference between sale and distribution.

Therefore, this Petitioner was charged, tried and convicted and punished for a crime that is not a crime under the statute contrary to the *Fifth, Sixth* and *Fourteenth Amendments.*

This Court has held in a line of cases that it is as much of a denial of due process to convict their Petitioner of a crime that is not within a statute as it is to convict this Petitioner of a crime with which he is not charged. *Rabe v. Washington,* 405 U.S. 313, and *Cole v. Arkansas,* 333 U.S. 196.

This warrant also charged the Petitioner with possessing "indecent" material for sale whereas "indecent" is not found nor proscribed in the statute either.

In regard to the material charged the warrant recites it as:

> "... books, drawings, pamphlets, pictures, etc...."

Not one title of any publication nor even a hint as to the meaning of "etc." is given. It then becomes necessary to research the meaning of "etc." to determine the full extent of the criminal act or conduct.

The first premise to be considered is that under Maryland law the charging document must stand on its own by its terms upon its face. A Bill of Particulars is purely discretionary and is not mandatory that it be given to any Defendant. It is specifically true that a defective charging

document will not be made good by a Bill of Particulars if granted. *Imbraguglia v. State,* 184 Md. 174 and *State v. Lassotovich,* 162 Md. 147. To claim a defect in the charging document a Motion to Dismiss must be filed before trial which was done in this case. With that we can look to the meaning of "etc." upon this criminal warrant. This is particularly necessary under the *Sixth* and *Fourteenth Amendments.*

In *Websters New International Dictionary, Second Edition,* unabridged "etc." and "etcetera" are defined as:

> "*Etcetera* (L.) etc. *and* + cetera *other things* and others (of the like kind); and the rest; and so on; and so forth; – used to point out that other things which could be mentioned are to be understood. Sometimes written as one word; usually abbreviated to etc."

And *Black's Law Dictionary,* Revised Fourth Edition, 1968 defines it thusly in its legal connotation;

> "ET CETERA (or ET CAETERA). And others; and other things; and others of like character; and others of the like kind; and the rest; and so on; and so forth. Muir v. Kay, 66 Utah, 550, 244 P. 901, 904; Osterberg v. Section 30 Development Co, 160 Minn. 497, 200 N.W. 738, 739; State on Inf. Haw v. Three States Lumber Co., 274 Mo. 361, 202 S.W. 1083, 1084; Wagner v. Brady, 130 Tenn. 554, 171 S.W. 1179; Fleck v. Harmstad, 304 Pa. 302, 155 A.875, 877, 77 A.L.R. 874. In its abbreviated form (etc.) this phrase is frequently affixed to one of a series of articles or names to show that others are intended to follow or understood to be included. So, after reciting the initiatory words of a set formula, or a clause already given in full, *etc.* is added, as an

> abbreviation, for the sake of convenience. And other things of like kind or purpose as compared with those immediately theretofore mentioned. Hisaw v. Ellison Ridge Consolidated School Dist., 189 Miss. 664, 198 So. 557, 558.
>
> In its abbreviated form (etc.) this phrase means and other like purposes. Anderson & Kerr Drilling Co. v. Bruhlme er, Tex.Civ.App., 115 S.W.2d 1212, 1214; other things of like character. Lewis v. Ladner, 177 Miss. 473, 168 So. 281, 282; other things or the rest; and so forth; used to indicate others of a kind specified, Potter v. Borough of Metuchen, 108 N.J.L. 447, 155 A.369, 370; others of the like kind; and the rest; and so on; and so forth, Forman v. Columbia Theater Co., 20 Wash.2d 685, 148 P.2d 951, 953. In such form it is frequently affixed to one of a series of articles or names to show that others are intended to follow or understood to be included so, after reciting the initiatory words of a set formula, or a clause already given in full, etc. is added, as an abbreviation for the sake of convenience. See Lathers v. Keogh, 39 Hun, N.Y., 579; Morton v. Young, 173 Ky. 301, 190 S.W. 1090; Becker v. Hopper, 22 Wyo. 237, 138 P. 179, 180, Ann. Cas. 1916D, 1041."

The criminal charge ending in "etc." which means and others of a like kind as of a like character or as *Black* says "and the rest" does not specify any definite criminal material or crime.

In *State v. Wallicks*, 11 N.W. 860, 861, 12 Neb. 407 it was appropriately stated:

> "Etc. is equivalent to saying 'and others', which is not a specific designation of anything; and an appropriation for certain described objects, etc. is not a specific appropriation within the Constitution."

To use etc in relation to what Petitioner is charged is a denial of the fundamental rights under the *Sixth Amendment* which is applicable to the states under the Fourteenth, *Argersingen v. Hamlin*, 407 U.S. 25. See also *U.S. v. Hess*, 124 U.S. 183.

A charging document must include all the essential ingredients of the alleged offense with such definiteness and reasonable certainty as to fully apprise the Petitioner of the nature and the cause of the accusation against him in order that he may be properly prepared in his defense. *Wong Tai v. U.S.*, 273 U.S. 77 and *Hagner v. U.S.*, 285 U.S. 427. The *Sixth* and *Fourteenth Amendments* require that the Petitioner "be informed of the nature and cause of the accusation" against him. See also *Article 21*, of the *Maryland Declaration of Rights*. Every essential element and every fact which is an element of a prima facie case of guilt must be stated in the complaint, *U.S. v. Hess*, 124 U.S. 483 and the description of the offense must be sufficiently full and complete to accord the accused his constitutional right to due process, *Hodgson v. Vermont*, 168 U.S. 262.

In *U.S. v. Luros*, 253 F. Supp. 160 (1965) some of the necessary ingredients and elements to be charged in a warrant was found to be the volume and issue number of the publications. This was so held by Judge Magill in Howard County, Maryland on November 24,1969 in *State v. Harry J. DiPaula*, Indictments 1969 – 4622 and 4633 citing *Seidman v. State*, 230 Md. 305 and *State v. Lassotovich*, 162 Md. 147.

It is also worthy to note at this point that a bill of particulars if granted is not a part of an indictment, *Lassotovich*, supra.

The principle of identifying what material is alleged to be obscene is noted in *State v. Monfred*, 183 Md. 303. See also *State v. Smith*, 17 R.I. 371, 22 A.282.

Equally important is the fact that a charging document should be precise enough to plead conviction or acquittal in bar to any subsequent prosecution, *Russell v. U.S.*, 369 U.S. 749, and *U.S. v. Cruikshank*, 92 U.S. 542.

With these principles let us look at the warrant upon which this Petitioner was arrested, tried and convicted. First, he was charged with possessing alternatively both "indecent" and "obscene" books; not one title or specific book was set forth. Next came drawings in the same context, as well as pamphlets and pictures which takes in probably millions of separate items, volumes and issues. That is not the end however, for the warrant then charges indecent and obscene "etc," which is a contraction for the word etcetera. Etcetera literally means *and others*, possibly every conceivable thing that could be obscene or indecent.

There is no place in the criminal laws for a defendant to be charged with a series of crimes identified only as "etcetera."

This warrant also fails to allege material and essential elements under *Section 418* since no allegation of distribution or exhibition is set forth. This warrant then fails to state a crime under the statute.

The warrant brought against Thomas Ayre in the case at bar fails to specify the volume and issue number or title,

name or description, if any, of the matters alleged to be obscene. For the failure a warrant to include all the essential ingredients of the alleged offense with such definiteness and reasonable certainty as to fully apprise the accused of the nature and cause of the accusation against him in order that he may properly prepare his defense, the warrant is thus constitutionally and fatally defective and must be quashed. *Wong Tai v. United States,* 273 U.S. 77 and *Hagner v. United States,* 285 U.S. 427. *Fifth, Sixth, Fourteenth Amendments.*

The Circuit Court of Appeals in *United States v. Jackson,* (CA-3) 344 F.2d 158 summarized it thus:

> "An indictment is sufficient when it enables the defendant to know the nature of the cause against him and to prepare for trial and is sufficiently specific that the record of the conviction or acquittal thereon can be used as a basis for a plea of double jeopardy in a subsequent prosecution."

The Federal Constitution, in the Bill of Rights, *Amendment Sixth,* guarantees each Defendant the right "to be informed of the nature and cause of the accusation" against him. Many states have also made this same right a part of their respective constitutions as Article 21 of the Maryland Declaration of Rights does. The *Fourteenth Amendment* makes this applicable to the states including Maryland.

Every material fact and essential ingredient of the offense, every essential element of the offense, must be alleged with precision and certainty, or, as has been stated, every fact whidh is an element in a prima facie case of guilt must be

stated in the complaint (*United States v. Hess,* 124 U.S. 483). The complaint must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation. (*United States v. Britton,* 107 U.S. 655, *United States v. Hess,* 124 U.S. 483, *Standard Oil Co. v. United States,* (CA-5) 307 F.2d 120; *Wood v. United States,* (CA-10), 317 F.2d 736) and the description of the offense must be sufficiently full and complete to accord the accused his constitutional right to due process of law. (*Hodgson v. Vermont,* 168 U.S. 262).

United States v. Luros, 253 F. Supp. 160 (1965), obviously, some of the necessary ingredients and elements to be charged in each Warrant are the volume and issue number of the publications or titles of film or description of so called matter, alleged to be obscene and to whom such materials were allegedly sold. The failure to so charge makes it clear that the Warrant is constitutionally deficient, and should be dismissed.

Several of the relevant cases decided by Appellate Courts in other states are as follows:

Reyes v. State, 15 So. 875 (1948), Fla.; *Kittleson v. State,* 9 So. 2d 807 (1942); *Adams v. Culver,* 111 S. 2d 665 (Fla. 1959); *State v. Barnes,* 253 N.C. 711, 117 S.E.2d 849 (1961); *State v. Greer,* 238 N.C. 325, 77 S.E. 2d 917 (1953); *People v. Zambounis,* 251, N.Y. 94, 167 N.E. 183 (1929); *People v. Zucker,* 225 N.Y.S. 2d 154 (1962); *State v. Zurhorst,* 79 N.E. 238 (1906) and *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318 (1965).

One of the most recent pronouncements of this principle is found in the Circuit Court for Howard County, Maryland in the matter styled *State of Maryland v. Harry J. DiPaula,* Criminal Indictments *Nos. 1969-4622* and *4633* decided 11/24/69 by His Honor Judge Magill, which was restated and affirmed in the re-indictment case of that Defendant in NOS 4754, 4755 and 4756 dated September 9, 1970. In the subsequent case one count in each indictment was dismissed for failure to name or specify the person or persons to whom the defendant distributed or offered to distribute the material while the former indictments were dismissed for failure to name the publications alleged to be obscene.

This became a critical factor later when it was discovered that the magazine introduced in the subsequent indictment was never testified to nor mentioned as an explanation for its substitution.

Those dismissals were predicated on two Maryland appellate decisions. *Seidman v. State,* 230 Md. 305 and *State v. Lassotovich,* 162 Md. 147.

In the Seidman case it was held:

> ". . lack of a full allegation of an essential matter, where known, even though the indictment may follow the language of the statute or of a statutory authorization, may be fatal . . . "

And in the *Lassotovich* case it was held that a Bill of Particulars is for the accused's benefit only and the fact he could demand it is immaterial in determining whether an indictment is defective for failure to identify the crime. In any event, a Bill of Particulars is not a part of an indictment.

See also *Willis v. State*, 205 Md. 118; *Jules v. State*, 85 Md. 305; and *Delcher v. State*, 161 Md. 475.

This necessity for identifying and naming the material was recognized in obscenity cases under the Maryland case styled, *State v. Monfred*, 183 Md. 303.

Directly in point is the case of *State v. Smith*, 17 R.I. 371, 22 A. 282.

The Petitioner's procedural and substantive due process rights under the *Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* require that the indictment filed against him be certain, free from ambiguity and vagueness, and specific as to the crime alleged in order for him to prepare his defense and to plead in bar to a subsequent prosecution.

It is an elementary principle of criminal law that in order to properly charge a criminal offense, there must be a formal charge containing all of the essential elements necessary to constitute the crime alleged. The *Sixth Amendment* to the *United States Constitution*, made obligatory on the various states through the Due Process clause of the *Fourteenth Amendment* provided in pertinent parts:

> "In all crimes or prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

The United States Supreme Court in *Cole v. Arkansas*, 333 U.S. 196, 92 L. Ed. 632 (1948), had the following to say of Due Process in an appeal from an Arkansas conviction:

> "No principle of procedural due process is more clearly established than that *notice of specific charge*, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

See also *Re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 683, (1947).

A criminal warrant should on its face apprise the accused of what he is charged, without relying on extraneous argument to clarify it. This warrant does not have a specific crime charged with certainty upon its face, and extraneous argument is required to attempt to clarify what crime is actually charged.

In discussing the elements necessary in an indictment to charge a criminal offense the United States Supreme Court in *Russell v. U.S.*, 369 U.S. 749, 8 L.Ed.2d 240 (1962), said at page 765:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, – it must descent to particulars'."

See also *U.S. v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588.

The Court in *Russell, supra,* went on to cite *U.S. v. Simmons*, 96 U.S. 360, and quoted from there the following:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished . . . "

The Court stated two criteria for the sufficiency of an indictment:

> "These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet' and secondly 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'."

See also *Cochran & Sayre v. U.S.* 157 U.S. 286; *Rosen v. U.S.* 161 U.S. 29; *Hagner v. U.S.*, 285 U.S. 427.

And finally, the court said:

> "An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him' . . . is defective, although it may follow the language of the statute."

See also *U.S. v. Simmons, supra.*

The United States Supreme Court in *U.S. v. Clark*, (1874), 20 Wall. 92, 22 L.Ed. 320 (Confiscation Cases) commented on both the information and the indictment as well as the disjunctive portion of the charges:

> *"It may be conceded that an indictment or criminal information which charges the person accused, in the disjunctive, with being guilty of one or another of several offenses, would be destitute of the necessary certainty, and would be wholly insufficient.* It would be so for two reasons. It would not give the accused definite notice of the offense charged, and thus enable him to defend himself, and neither a conviction or an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offenses." (Emphasis supplied.)

It would violate Due Process to charge the Defendant in such a manner as in this case.

2. The provisions of *Article 27, Section 418* do not contain any definition of the words "obscene" much less the specifically defined sexual conduct mandated by this Court, and the term has been judicially construed to not require such conduct and thus is void for vagueness and impermissible overbreadth in limiting *First Amendment* freedoms contrary to the provisions of the *Fourteenth Amendment.*

Article 27, Section 418 has several definitions set out in *Section 417* that apply to it. However, there is no definition for the term "obscene".

Therefore "obscene" must be determined as it is known in legal terminology just as any other crime that is not legislatively defined. In that regard, the United States Supreme Court in 1954 in *Roth v.U.S.* 354 U.S. 476 set forth the minimal requirement of limiting speech for obscenity by requiring that a finding be made that the average person applying contemporary community standards would find that

the work taken as a whole appeals to the prurient interest. And in 1966 that Court in *Memoirs v. Massachusetts*, 383 U.S. 413 required the states to establish three independent findings and to further find that the three tests were met together in the work, i.e. (1) The dominate theme of the material taken as a whole appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) The material is utterly without redeeming social value.

The Maryland legislature following these decisions enacted the present *Section 418* which took effect on June 1, 1967. Therefore the Maryland legislature must be presumed to have adopted the Constitutional test for obscenity on that date. Therefore it was the legislature's intent to have prosecutions proceed under the *Memoirs* test. The Maryland Courts adopted this view requiring *Memoirs* criteria. See *Levin v. State*, 1 Md. App. 139 (1967); *Lancaster v. State*, 7 Md. App. 602; *Woodruff v. State*, 11 Md. App. 202 (1971); *Dillingham v. State*, 9 Md. App. 669 (1970); and *Village Books Inc. v. States Attorney*, 263 Md. 76 (1971), 282 A.2d 126.

The various Appellate Court decisions were not concerned with the necessity for specifically defining the patently offensive "hard-core.' sexual conduct. In fact, the Court of Appeals in *Village Books* stated that the precise meaning of "hard-core" pornography continued to elude them as well as other Courts. It was emphasized in the statement that "perhaps a completely satisfactory definition will never evolve". It was also set out in *Levin v. State*, 1 Md. App139 (Cert. denied Court of Appeals, 6/13/67 that no sexual act was necessary to constitute "hard-core" pornography.

Yet on June 21, 1973 the Supreme Court of the United States in *Miller v. California,* No. 70-73, 41 L.W. 4923; 413 U.S. 15, 93 S. Ct. ___ 37 L. Ed. 2d 419 and the companion cases completely changed the law of obscenity. It is better put in their own words:

> "*State statutes* designed to regulate obscene materials *must be carefully limited.*
>
> . . .
>
> "As a result, *we now confine the permissable scope of such regulation* to work which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. A state offense must also be limited to works which taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> . . .
>
> "Under the holding announced today, *no one will be subject to prosecution* for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard-core' sexual conduct specifically defined by the regulating state law,* as written or construed. *We are satisfied that these specific prerequisites will provide fair notice* to a dealer in such materials that his public and commercial activities may bring prosecution." (emphasis supplied).

Immediately following this decision the Supreme Court on June 25, 1973 vacated and remanded the judgment of

Village books Inc. v. States Attorney, ___ U.S. ____ No. 73-1060, Oct. Term, 1973. However, the Maryland Court of Appeals reconsidered the case in light of *Miller* as directed and by order dated October 10, 1973 reinstated its judgment and order. That Court apparently refused to construe *Section 418* or *418-A* to specifically define the "hard-core" sexual conduct. Therefore the Maryland statute has no authoritative judicial construction for such specific definition. This is markedly true since the statute itself has no definition and it is not susceptibel of any construction to provide such conduct under Maryland law.

In fact, the Court there could not so construe the vacant statute and insert by judicial legislation a selection of the varied sexual conduct that would be considered "hard-core" pornography. To do so would violate the doctrine of separation of powers and the mandates of *Article 8,* of the *Maryland Declaration of Rights* and *Article III, Section 1, 27, 28,* and *29* of the *Constitution of Maryland.*

The trial Court therefore clearly erred in creating legislation where it did not formerly exist in convicting this Petitioner. It also erred in not considering the construction of the statute by Maryland's highest Court since Petitioner was entitled to rely upon the highest authoritative decision.

Maryland holds that where a statute is open to interpretation it will be construed to operate prospective, *Grinder v. Nelson, 9 Gill 299; Mayor and City Council v. Sehner,* 37 Md. 180; *Braverman v. Bar Association,* 209 Md. 328. Since sexual conduct was not the criteria under the statute on June 26, 1972 as well as all the other alterations

such as burden of proof, evidence and standards, this Petitioner cannot now be proceeded against in this fashion.

Since Maryland's highest authoritative Court, when directly presented the opportunity to construe this statute by this Court, absolutely refused to do so then this statute is constitutionally invalid. This is not a case where the mere opportunity was not afforded that Court for this was impliedly ordered by this Court upon its remand for reconsideration in light of *Miller*, supra.

3. Petitioner was entitled to trial by jury since the statutory authorized penalty was not a petty offense and the denial therefore is a denial of the privileges and immunities of the *Fourteenth Amendment* by way of the *Sixth Amendment.*

The crime of violating *Article 27, Section 418,* is punishable by imprisonment for one year and a fine of one thousand dollars ($1,000.00) for the first offense. A subsequent conviction permits imprisonment up to three years and a five thousand dollar ($5,000.00) fine. This clearly entitles the Petitioner to trial by Jury as he requested. And this right is guaranteed by virtue of *Article 21* of the *Maryland Declaration of Rights* and the *Sixth* and *Fourteenth Amendments* to the *United States Constitution.*

Judge Harris denied the Jury trial since the penalty imposed in the District Court was a one hundred dollar ($100.00) fine and costs. Apparently he considered it to be a petty crime under the dictates of *Baldwin v. New York*, 399 U.S. 66 where the division was set out at six months imprisonment and a five hundred dollar ($500.00) fine. Yet under Maryland law a penalty of 3 months or $500.00 is the highest penalty for a petty offense.

However, in *Frank v. U.S.* 395 U.S. 147, it was noted that the penalty authorized not the one imposed, was controlling. See also *Staten v. State,* 13 Md. App. 425. Here not only was the authorized penalty severe enough in itself, but also the fact that another conviction thereafter permitted triple the first offense imprisonment hinged upon the first conviction.

If the ruling below was correct, then any conviction for rogue and vagabond, *Section 490,* Carnal Knowledge, *Section 464,* removing railroad tracks and switches, *Section 457,* pandering, *Section 426* and many other misdemeanors tried in District Court may not be tried with a Jury upon appeal.

Clearly the penalty imposed below is not the criteria in determining a petty offense. For it is the statutory penalty that determines the gravity of the crime as well as the right to trial by Jury. *Frank v. U.S.,* 395 U.S. 147; *Baldwin v. N.Y.,* 399 U.S. 66; and *Codispoti v. Pennsylvania,* No. 73-5615 decided June 26, 1974.

4. Does the exemption create invalid classifications and thereby deny Petitioner the equal protection of the law guaranteed by virtue of the Fourteenth Amendment?

Article 27, Section 418 is governed by the exemptions from criminal liability and prosecutions contained in *Sections 417 (2)* and *423.* In effect motion picture theater employees no matter what they sell or exhibit cannot be prosecuted. Similarly persons with bona fide "justification" may possess and sell this matter without prosecution.

This Petitioner is merely an employee and is denied these exemptions in the book store.

Therefore the statute as written lays an unequal hand upon the Petitioner. A classification for exemption in a penal statute must have a valid and substantial reason for the classification. There is no valid distinction between scenes portrayed on film and those portrayed in a book or magazine.

The Fourteenth Amendment to the Constitution of the United States provides that no state shall commit certain acts or omissions which in pertinent part is as follows:

> "... nor deny to any person within its jurisdiction the equal protection of the laws...

The United States Supreme Court in *McLaughlin v. Florida,* 379 U.S. 184, has interpreted this provision to mean:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as insidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

And in *Cox v. Louisiana,* 379 U.S. 559, the same Court reversed a state court conviction and while holding the statute unconstitutional as a denial of equal protection of the laws among other reasons had this to say:

> "This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power, or, as in this case, the *quivalent of such a system by selective enforcement of an extremely broad prohibitory statute."* (Emphasis supplied)

The United States Supreme Court ruled a Maryland conviction for disorderly conduct was a denial of equal protection of the laws in *Niemotko v. Maryland,* 340 U.S. 268. The Court there had this to say of regulations of *First Amendment* freedoms:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.
>
> No standards appear any where; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here.
>
> The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims of personal opinions of a local governing body."

And in a case styled *Griffin v. Illinois,* 351 U.S. 12, the Court ordered the state to supply the defendant with a

transcript as an indigent, concluding the denial of a free transcript for an indigent was not affording equal protection of the laws whereas a person with sufficient means could pay for the service. The Court reflected upon the evolution of the right and the Illinois denial thusly:

> "These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'
>
> Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioner from invidious discriminations.
>
> Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.

See also *Burns v. Ohio*, 360 U.S. 252.

Now applying this arbitrary classification of vendors of *First Amendments* materials to the facts therein, we find that there is created a privileged class upon whom is conferred an exemption whereby they may be conclusively exempted from criminal prosecution.

The United States Supreme Court in a case styled *Morey v. Doud,* 354 U.S. 457, condemned an Illinois statute for creating unequal exemptions and stated:

> "This is not a case in which the *Fourteenth Amendment* is being involved to protect a business from the general hazards of competition. The hazards here have their root in the statutory discrimination.
>
> Taking all these factors in conjunction – the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by singling out of the money orders of a named company, with accompanying economic advantages – we hold that the application of the Act to appellees deprives them of equal protection of the law."

The Court of Appeals for the State of Maryland in a case styled *Police Commissioner of Baltimore City v. Siegel Enterprizes,* 162 A.2d 727 (1960), had before it the Maryland Obscenity Statute wherein newspapers were not included within the framework of the proscribed dissemination. The Court there held the provision invalid as a denial of equal protection of the laws. The Court held:

> "Freedom of the press is directly affected as to one class of publication but not as to another, and the classification is made, not on the basis of material deemed objectionable, but the proportion of that material to other published matter. The classification, in my opinion, is unreasonable, and violates the Equal Protection Clause of the Fourteenth Amendment.
>
> . . .

> The discriminations between classes of publications which are infringements of the Equal Protection Clause inhere in every provision of the statute."

The Supreme Court of California also dealt with this problem in the case of *Katzev v. County of Los Angeles*, 341 P.2d 310 wherein the Court there found that the statute applied to the publications but exempted newspapers from its proscription. The Court there stated:

> "The ordinance denies distributors such as plaintiffs equal protection of the laws, since it establishes arbitrary and unreasonable exemptions.
>
> . . .
>
> Because these exemptions are unrelated to the purported purpose of the legislation, they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws. An exemption must be reasonable in order to meet the standard prescribed by Yick Wo v. Hopkins, . . .
>
> . . .
>
> Unlike the exemptions for accounts of crime that are true or drawn from religious writings, this latter one is not based on content, nor is it a completely different form of representing a story. Rather, the exemption is based solely on the nature of the product produced on paper."

Likewise the State of Washington declared a state statute unconstitutional for containing arbitrary classification. In the case styled *Adams v. Hinkle*, 322 P.2d 844, the Court rejected the statute for exempting newspapers from comic book

licensing requirements although the Court found various other portions deficient in the area of First Amendment freedoms:

> "The Attorney General earnestly contends that this is a reasonable classification, and that the legislature has a right to classify if there be a rational basis for the classification. But this is not so when the equal protection clause is concerned with a right claimed under the First Amendment.
>
> . . .
>
> When the rights claimed are among those protected from legislative invasion by the first amendment, the equal protection clause of the fourteenth amendment assumes increased importance.
>
> . . .
>
> Even if considered separately from a right guaranteed by the first amendment, the constitutionality of such a classification is precarious at best."

The United States Supreme Court in *Yick Wo v. Hopkins,* 30 L.Ed. 220 at page 225 delineated much of the protection afforded citizens under the *Fourteenth Amendment* wherein the Court stated at page 225; reaffirming its prior decisions:

> . . . in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.
>
> . . .

> . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses . . . Class legislation, discriminating against some and favoring others, is prohibited."

The Defendant is exposed to prosecution under *Section 418*, while the proprietor or employee of another establishment is not to be subjected to the provisions of *Section 418* simply for the dissemination of a film which has no standard in the statute. There can be no reasonable classification between a magazine, pamphlet, picture, etc., and a film. Therefore, this statute lays an unequal hand upon Appellant in relation to other disseminators of First Amendment publications.

As has been variously enunciated by the Courts, including the Supreme Court of the United States, "precision of regulation is the touchstone" in the area of First Amendment freedoms. Precision in this regulation is completely lacking.

CONCLUSION

The charging document, a criminal arrest warrant, charged this Petitioner with a crime that is not within the statute. Although the warrant could have been amended prior to trial this was not done. Under Maryland law the charging document must stand or fall on its face and any Bill of Particulars does not form or become part of it nor does the affidavit upon which it is issued.

The crime charged is possessing with intent to sell whereas only possessing with intent to distribute is such a crime. The statute itself defines, under *Section 418,* the word "distribute" as "to transfer possession of whether with or without consideration" so therefore consideration or sale plays no part in it. Clearly the Motion to Dismiss should have been granted, since this is the proper way under Maryland law to have this defense raised.

Even beyond this, the warrant recites the possession with intent to sell multiple types of printed, graphic and pictorial matter without even designating the material charged. If this is not vague or overbroad enough the warrant charge ends with etc. In that statute there are 21 separate offenses alone.

The warrant also charges the Petitioner with possessing with intent to sell "indecent" materials which clearly is not within the statute nor under the *Miller* standards.

Passing to the statute, the Maryland Court of Appeals has held in its latest decision immediately preceding *Miller* that no sexual act was necessary and that a definition for obscenity

may never evolve. That Court following *Miller* refused to construe the statute by merely re-affirming its prior decision. Therefore the Maryland statute here is impermmissibly overlybroad and vague and therefore repugnant to the Fourteenth Amendment in limiting First Amendment freedoms.

And finally, this Petitioner is clearly entitled to trial by Jury which he demanded and was arbitrarily denied.

For all of the above reasons Petitioner prays that this Honorable Court grant this Petition for Writ of Certiorari and Motion to Dismiss.

Respectfully submitted,

WILLIAM E. SEEKFORD

Attorney for Petitioner.

APPENDIX A

IN THE CRIMINAL COURT OF
BALTIMORE
CRIMINAL COURT WARRANT NO. 27301598

State of Maryland
v.
Thomas W. Ayre

Appeal from District Court of Maryland
Warrant No. 150715

MOTION TO DISMISS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Comes now the Defendant, Thomas W. Ayre, by his attorney, William E. Seekford, Esquire and moves this Honorable Court to dismiss the criminal warrant filed against him and for reasons states:

1. The statutory provisions of Article 27, Section 418 of the Annotated Code of Maryland, are as written, repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States,* because:

a. Said statutory provisions are void for vagueness in that same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States;* and further,

b. Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards prescribed

by the United States Supreme Court in connection with magazines, publications and materials presumptively protected under the *First* and *Fourteenth Amendments;* and further

c. The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the federal constitutional rights of citizens of the State of Maryland and the United States, as well as the Defendant, to publish, distribute, circulate, possess, sell, receive and exhibit publications; and further,

d. Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth* and *Fourteenth Amendments to the United States Constitution* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's subordinating interest which is compelling to justify state action limiting *First Amendment* freedoms; and further,

e. Said statutory provisions are impermissibly overly broad and repugnant to the procedural due Process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material to the constitutional protection of the *First Amendment* to which it is entitled; and further

f. Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* in that said statutory provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Defendant's *First Amendment* rights by law enforcement officials of the State of Maryland; and further,

g. Said statutory provisions are void for overbreadth in that they do not limit the proscribed activities only to public distribution, but purports to proscribed private viewing and/or exhibition of presumptively protected *First Amendment* materials; and further,

h. That Defendant is denied the equal protection of the laws in that improper exemptions are permitted by arbitrary classifications; and further,

2. That the charging document purports to charge a crime under Article 27, Section 418 which statutory provision is not validly in force in the State of Maryland since the decisions of the United States Supreme Court on June 21, 1973 variously styled as *Miller v. State of California* No. 70-73, et seq. formulated specifically the constitutional requirements in obscenity prosecutions in the United States limiting such prosecutions to be conducted under statutes that regulate works in the depiction or description of "hard cord" sexual conduct which is not present in the statute under which the Defendant is being prosecuted either as written or authoritively construed.

3. That this Defendant is being prosecuted under the Maryland obscenity statute is being proceeded against under an *ex post facto* statute in that he was arrested on or about June 26, 1973 for an alleged offense of that date and is being prosecuted under a statute which will have to be amended by judicial interpretation which was both unforseeable and retroactive in the judicial enlargement of the criminal statute and further that the ruling will alter the legal rules of evidence and permits the receiving of less proof and evidence and of the prosecutions evidence and testimony than the law required at the time of commission of the offense to the prejudice of the Defendant contrary to the *Due Process* provisions of the *Fourteenth Amendment* and *Article I, Section 10* of the Federal Constitution.

4. That the charging document fails to inform the Defendant of what he is called upon to defend and fails to protect him from future prosecutions by denying him the

right to plead any prior acquittal or conviction for the future prosecutions and therefore denies to him Due Process of the laws and fails to identify the books, drawings, pamphlets and the etcetera therefore.

5. That the criminal warrant is fatally defective and denies to Defendant the due process of the laws for failure to set forth the essential elements of the offense including the name or names to whom this Defendant allegedly sold, distributed, or offered to distribute any obscene matter or possessed with intent to sell.

6. That the criminal warrant is fatally defective and denies to Defendant the Due Process of the laws for failure to set forth the essential elements of the offense including what matter is being charged against this Defendant whether it be a motion film, book, magazine, newspaper, written material, picture, drawing, photograph, pictorial representation, statue, figure, recording, transcription, reproduction, articles, equipment, machine or materials and further that if the matter be limited to those issued in volumes and publications numbers or are in any way titled to differentiate various films, books or items that the criminal warrant fails to specify what particular issue, volume number or title thing is charged against this Defendant and therefore places him in defense of every newspaper issue, magazine issue and volume, every title book, and every motion picture film and item present in existence and therefore is destitute of the necessary particularity required in order to permit this Defendant to properly prepare the defense in this case and to plead judgment of acquittal or conviction in bar to any further or future prosecutions.

7. That the statute under which Defendant is being charged is void for vagueness and impermissible over breadth and thereby repugnant to the provisions of the *First, Fifth* and *Fourteenth Amendments* to the *Federal Constitution* for the reason that the statute fails to properly warn this Defendant of what actions on his part would come within the proscription of this statute and further that the definition of obscenity is constitutionally deficient as well as all of the

matter that is purported to be contained within obscenity as used in Article 27, Section 417 and 418.

8. That the statute aforesaid denies to this Defendant the equal protection of the laws in that although this Defendant is neither an officer of the legal entity wherein he was alleged nor has any financial interest therein other than receiving salary and wages, he is not entitled to nor granted the right to claim an exemption from such prosecution while an individual, although also an employee and who is not an officer or has a financial interest, in motion picture theaters are totally and fully exempted from prosecution for the offenses created under *Section 418* as well as those persons exempted as persons for scientific, educational, governmental or *other similar justification* for possessing or distributing identical

9. That this statute aforesaid and the warrant issued thereunder charging this Defendant with violations of it is void for vagueness and impermissible over breadth in that it is in conflict with the *First* and *Fourteenth Amendments* to the Federal Constitution in regulating freedom of speech and press as those provisions have been interpreted and standards enunciated by the Supreme Court of the United States on or about June 21, 1973 where that Court specifically required statutes to define conduct and community standards which are only applicable for the regulation of works which depict or describe sexual conduct and that no one will be subject to prosecution for the sale of exposure of obscene material unless these materials depict or describe patently offensive "hard core sexual conduct" specifically defined by the regulating state law as written or construed, which are specific pre-requisites to provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution which is not present in the statute and warrant at bar for the offense occurring on June 26, 1973.

10. That the statute as written and as alternatively construed fails to only include that particular hard core pornography from expression protected by the *First Amendment* as required by the Supreme Court of the United States.

11. That the statute is void for vagueness and impermissible over breadth in that there are no provisions for fair warning to this Defendant as to what constitutes the community in which the particular alleged conduct occurred and in which community this Defendant must conform his activities in order to avoid afronting the local community standards in any dissemination of presumptively protected First Amendment materials.

12. That this warrant is fatally defective for failure to charge this Defendant with an essential element of the crime of obscenity including scienter, i.e. guilty knowledge of the contents and character of the materials alleged to be obscene.

13. And for such other and further reasons to be advanced at the hearing held hereon,

WHEREFORE, Defendant prays this Honorable Court dismiss the criminal warrant filed against him.

/s/ William E. Seekford,
Attorney for Defendant

IN THE CRIMINAL COURT
OF BALTIMORE

State of Maryland
v.
Thomas W. Ayre

District Court Appeal No. 37301598

MEMORANDUM OPINION DENYING DEFENDANT'S MOTION TO DISMISS

HARRIS, J.:

On August 9, 1973, the defendant in the above appeal was convicted in the District Court of Maryland, for Baltimore City, of possession of obscene materials, in violation of Article 27, Section 418 of the Maryland Code, and was fined $100. and costs.

When the appeal was scheduled for trial in the Criminal Court of Baltimore on October 29, 1973, William E. Seekford, Esq., counsel for the defendant, filed a motion to dismiss the criminal warrant filed against the defendant. Argument on the motion was held without the taking of any testimony, and the decision on the motion was held *sub curia* so that the Court could further consider the motion and the authorities cited by Mr. Seekford in a very comprehensive brief filed by him.

Although the motion to dismiss includes a substantial number of allegations, they can be fairly summarized as an attack upon the arrest warrant which was issued by a judicial commissioner of the District Court on June 26, 1973, and the constitutionality of Section 418 of Article 27, particularly in view of the decision of the U.S. Supreme Court in the case of *Miller v. California*, decided on June 21, 1973, and four other

cases decided by the Court on that same date – *Paris Adult Theatre I v. Slaton; U.S. v. Orito; Kaplan v. California;* and *U.S. v 12 200-ft. Reels of Super 8mm Film.*

THE ARREST WARRANT

The arrest warrant which is challenged by the defendant formally charges the defendant with violation of Section 418 of Article 27, in the following language:

> "Unlawfully and knowingly did possess obscene and indecent books, drawings, pamphlets, pictures, etc. with intent to sell in Balto. City, St. of Md."

Obviously, the arrest warrant itself includes only the conclusions of the arresting officer. Under the provisions of Maryland District Court Rule 706 (c) (1), it must be supported by an application from the arresting officer showing "probable cause to believe that a crime has been committed and that the defendant has committed it." Following the hearing, the State filed a "Motion to Supplement Record", by the addition of the required affidavit. This motion was granted. The affidavit alleges that the defendant sold to the affiant, Police Sergeant Donald Dougherty, "one 'The Sex Scene' volume Book Three for the price of $5.20. The book shows various pictorial obscene sexual activity. Copy of book displayed herewith." In the opinion of this Court, this statement of facts showed sufficient probable cause to justify the issuance of the arrest warrant.

The warrant is also attacked because it allegedly does not sufficiently inform the defendant of the nature of the offense with which he is charged. It would appear that the defendant matintains that the arrest warrant should include particulars as to the date, time, and place of the alleged commission of the crime. This Court knows of no authority which requires an arrest warrant to include a bill of particulars or a bill of discovery on its fae. This arrest warrant can be likened to certain types of indictments which, by statute, are specifically

exempted from including in the indictment the type of particulars which the defendant maintains he is entitled to receive in this warrant. See, for examples, Article 27, Section 610, concerning indictments for gaming or lotteries; Section 612, concerning indictments for forging, altering, embezzling, etc.; Section 613, concerning indictments describing money; Section 614, concerning indictments for the unlawful sale of liquor or beer; Section 615, concerning indictments for violation of ordinances; and Section 616, concerning indictments for murder or manslaughter.

In this case, the arrest warrant complies fully with the provisions of Maryland District Rule 706 (e) (2), which requires only "a plain, concise and definite statement of essential facts constituting each offense charged, and each formal charge placed against the defendant."

The arrest warrant being valid, the arrest of the defendant was lawful. *Groh v. Warden,* 1 Md. App. 674, 676; *Nestor v. State,* 243 Md. 438, 445; *Crowe, et al v. State,* 240 Md. 144, 151; *Bloomhaum v. State,* 237 Md. 663, 664.

Article 27, Section 418

The attack by the defendant on the constitutionality of Section 418 charges that the statute is unconstitutional under the U.S. Constitution, specifically the First, Fourth, Fifth, Sixth and Fifteenth Amendments, and that it "is not validly in force" in Maryland since the above named decisions of the U.S. Supreme Court on June 21, 1973.

Although the constitutionality of Section 418 has never been specifically passed upon, Section 418A – with which Section 418 is directly related – was found to be constitutional, at least inferentially, by the Court of Appeals, in the case of *Village Books, Inc. v. State's* Attorney for Prince George's County, 263 Md. 76. Moreover, Section 418 is identical with Section 311.2 of the California Penal Code, which was the basis of the prosecution in *Miller v. Cal., supra.* No question was raised concerning the constitutionality of the

California statute in *Miller*. It is logical to assume that, if the California statute was unconstitutional, in view of the U.S. Supreme Court, it would have so held in the *Miller* decision.

Nor can this Court discern any reason why Section 418 "is not validly in force" in Maryland since the *Miller* decision. In reaffirming *Roth v. United States*, 354 U.S. 476, to the effect that obscene material is not protected by the First Amendment, *Miller* also holds that obscene material can be regulated by the States, subject to the specific safeguards stated in the opinion, *without* a showing that the material is "utterly without redeeming social value"; and further holds that obscenity is to be determined by applying "contenporary community standards", instead of the "national standards", as originally laid down in *Jacobellis v. Ohio*, 378 U.S. 184. Just how these holdings render Section 418 of Article 27 invalid is difficult for this Court to understand. *Miller* enunciates new basic guidelines for the trier of fact, as follows:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

A later portion of the opinion indicates that, to be proscribed by *Miller*, the obscene materials must "depict or describe patently offensive, 'hard cord' sexual conduct specifically defined by the regulating state law, as written or *construed*" (emphasis added). It is clear that Section 418 does not specifically define hard core sexual conduct of this nature. It is equally clear, however, that the Maryland appellate courts have repeatedly *construed* Section 418 to include such materials, under the more rigid tests preceding

Miller. Woodruff v. State, 11 Md. App. 101; *Dillingham v. State,* 9 Md. App. 669; *Lancaster v. State,* 7 Md. App. 602; *Donnenberg v. State,* 1 Md. App. 591; *Levin v. State,* 1 Md. App. 139; *Monfred v. State,* 226 Md. 312.

In the opinion of this Court, Section 418 has been construed by the Maryland courts in such a manner as to satisfy the requirements of *Miller.*

For the above reasons, this Court holds that (1) the arrest warrant issued in this case is valid, and that the ensuing arrest of the defendant was valid; and (2) Section 418 of Article 27 of the Maryland Code is constitutional, and is not rendered invalid by the U.S. Constitution or the five decisions rendered by the U.S. Supreme Court on June 21, 1973, particularly *Miller v. California, supra.*

The defendant's motion to dismiss the warrant is denied, therefore, for the above reasons. When the case is tried on its merits, the question of whether or not the materials alleged to be possessed by the defendant come within the *Miller* definition of hard core sexual conduct, or hard core pornography, must depend upon the evidence to be offered by the State.

/s/Charles D. Harris,
Judge

November 5, 1973.

APPENDIX "B"

IN THE COURT OF APPEALS
OF MARYLAND

Miscellaneous Docket No. 12 (Criminal)
September Term, 1974

Thomas M. Ayre
v.
State of Maryland

(Misc. No. 34, September Term, 1973
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denies as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: April 11, 1974.

APPENDIX "C"

ARREST WARRANT

DISTRICT COURT OF MARYLAND FOR
DISTRICT 1

No. 150715

District Court of Maryland

to: Any law enforcement officer authorized to serve criminal proceedings, GREETINGS.

The sworn application of *Sgt. Donald Daugherty* of *CID Vice* alleges that *Thomas Ayre* of *1629 Winford Road.*

DESCRIPTION OF ACCUSED: Sex *M* Color *W* Age *36* Height *5'11"* Weight *170* Hair *Lt. Brn.* Eyes Complexion *Ruddy*

Other: (Scars, tattoos, mustache, infirmities, etc.) .....

.....

did on or about *June 26, 1973* at *428 E. Balto. St.*

Unlawfully & knowingly did possess obscene & indecent books, drawings, pamphlets, pictures, etc. with intent to sell in Balto. City, St. of Md. .....

.....

(Concise statement of essential facts constituting offense charged)

The said defendant is hereby formally charged with violation of Code, Art.*27*, Sec. *418*, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State.

You are, therefore, commanded to arrest the person charged and to bring him before me or some other judicial officer as required by law. Hereof fail not or leave you then and there the warrant.

Issued this . . . . . 26 . . . . . day of . . . June . . . . . , 1973.

/s/ (Illegible)
Judicial Commissioner.

NOTICE TO PERSON ARRESTED

You do not have to say anything to anyone about any charge which as been placed against you, and anything you do say may be used against you in court.

You have the right to consult with a lawyer before the police start questioning you and to have a lawyer present while the police are questioning you. If the police are questioning you and a lawyer is not present, you may have the questioning stopped so that you may talk to a laywer. You also have the right to consult with your family or friends. If you are being questioned or held and you want to talk to your family or friends or to a lawyer, you will be allowed to use a telephone, if necessary.

If you want a lawyer but cannot afford to pay for one, you may have the right to have one assigned to represent you free of charge, if the crimes with which you are charged are serious enough. A judge or a District Court commissioner or the Public Defender's Office can tell you whether you are eligible for a court-assigned laywer.

I certify that at . . . 11:30 . . . . . o'clock on . . . . . 9 July, 73 . . . . at . . . . 428 E. Balt. St. . . . . I executed

the above warrant by arresting the defendant or personally delivering to him and leaving with him a copy of the warrant.

/s/ Donald Dougherty
(Arresting Officer)
Sgt.
601 E. Fayette Street.

Trial 7/25/73
Continue Own Recog.

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION.

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * * *

[AMENDMENT IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT VI]

[*Right to Speedy Trial, Witnesses, etc.*]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * * * * * *

[AMENDMENT XIV]

Section 1.

[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * *

ANNOTATED CODE OF MARYLAND

ARTICLE 27.

OBSCENE MATTER

§ 417. Definitions.

As used in this subtitle,

(1) *"Matter"* means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(2) *"Person"* means any individual, partnership, firm, association, corporation, or other legal entity, but shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages.

(3) *"Distribute"* means to transfer possession of, whether with or without consideration.

(4) *"Knowingly"* means having knowledge of the character and content of the subject matter.

§ 418. Sending or bringing into State for sale or distribution; publishing, etc., within State.

Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

§ 423. Exemptions.

The prohibitions and penalties imposed in this subtitle shall not extend to persons having bona fide scientific, educational, governmental, or other similar justification for possessing such matter, or to distributions thereof pursuant to such justification.

§ 424. Penalty.

Violation of this subtitle is punishable upon conviction by fine of not to exceed one thousand dollars ($1,000.00) or by imprisonment for not to exceed one year, or both. Any subsequent conviction of a violation of this subtitle is punishable by a fine of not to exceed five thousand dollars ($5,000.00) or by imprisonment for not to exceed three years, or both.

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Supreme Court, U.
F I L E D
OCT 24 1974
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2008

THOMAS M. AYRE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2008

THOMAS M. AYRE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF BALTIMORE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On November 30, 1973, Judge Charles D. Harris, sitting in the Criminal Court of Baltimore City, found Petitioner guilty in Criminal No. 3701598 of possession of obscene materials with the intent to sell them under Maryland Code, Article 27, Section 418. Petitioner then applied to

the Maryland Court of Special Appeals for a Writ of Certiorari and the petition was denied without comment on February 7, 1974. Thereupon, Petitioner applied to the Maryland Court of Appeals, and on April 11, 1974, that Honorable Court denied the Petition for Writ of Certiorari for the reason that "there has been no showing that review by certiorari is desirable and in the public interest". A copy of the Order of the Court of Appeals *denying* certiorari has been set out in Appendix "B" in Petitioner's brief.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28 of the United States Code, Section 1257.

QUESTIONS PRESENTED*

I. Whether or not the charging document was sufficient to charge Petitioner of the crime of which he was convicted?

II. Whether or not the prohibitions of Article 27, Section 418, are vague and over-broad, so as to unduly restrict Petitioner's First Amendment Right to freedom of expression?

III. Whether or not Petitioner was denied his right to a jury trial in the case where the judge, sitting in the Criminal Court of Baltimore, was precluded from sentencing Petitioner to any more than the $100 fine and costs, which penalty had been imposed at the District Court level?

---

* Although Petitioner has listed some seven questions, Respondent has couched all of Petitioner's questions in terms of the four questions listed in this Brief in Opposition to Petition for Writ of Certiorari.

IV. Whether or not the statute (Article 27, Section 418), under which Petitioner was convicted, denied him equal protection of the law in that there are exempted from prosecution certain persons such as employees of theatres?

STATUTES INVOLVED

Petitioner contends that the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution are involved. Petitioner also maintains that Sections 417, *et seq.*, of the Maryland Code are involved.

STATEMENT OF THE CASE

Petitioner was charged in the District Court of Maryland with possession of an obscene magazine with the intent to sell same under Article 27, Section 418 of the Maryland Code. On August 9, 1973, Petitioner was tried before Judge Edgar P. Silver in the District Court of Maryland, found guilty, and fined one hundred dollars. Petitioner then appealed to the Criminal Court of Baltimore City and filed a prayer for a jury trial and a motion to dismiss the charge against him. The case came on for a hearing on October 29, 1973, before Judge Charles D. Harris. Judge Harris denied both the request for a jury trial and the motion to dismiss. The trial of the matter took place on November 30, 1973. Judge Harris found Petitioner guilty and imposed the same fine as was imposed at the District Court level.

As is recanted under "Opinions Below", *supra*, both the Maryland Court of Special Appeals and the Maryland Court of Appeals have denied Petitioner's Writs of Certiorari to those respective courts.

STATEMENT OF FACTS

On June 26, 1973, at approximately 12 noon, Baltimore City Police Sergeant Donald Daugherty went to the Baltimore News Center at 428 East Baltimore Street, in Baltimore City. There he purchased from Petitioner, who was behind the counter at the front of the store, a magazine entitled "The Sex Scene". (At the request of this Honorable Court, Respondent has delivered to this Court the magazine in question and a copy of the trial transcript, which transcript was typed through the efforts of Petitioner.)

ARGUMENTS

I.

THE CHARGING DOCUMENT WAS SUFFICIENT TO CHARGE PETITIONER WITH POSSESSION OF AN OBSCENE MAGAZINE WITH THE INTENT TO SELL SAME.

Petitioner maintains that the charging document (Arrest Warrant) failed to set forth a crime in that it charges possession with intent to sell, whereas the crime under the statute prohibits possession with intent to distribute. Respondent submits that in this question (as with all four questions presented by Petitioner) no substantial federal question has been presented (Supreme Court Rule 19), nor has Petitioner shown a conflict between existing Maryland law and existing constitutional law as enunciated by this Honorable Court. Therefore, this question, and the other three questions, are not properly reviewable by way of certiorari to the Supreme Court of the United States.

Notwithstanding this, Respondent would point out that the charging document alleges that Petitioner "unlawfully and knowingly did possess obscene and indecent books, drawings, pamphlets, pictures, etc., with intent to sell in Baltimore City, State of Maryland".

Black's Law Dictionary, 4th Ed., defines the word "distribute" to mean: "To deal or divide out in proportion or in shares". It is therefore clear that the word "sell" used in the charging document comes within the broader term of "distribute". Hence, the charging document was sufficient in this regard.

Petitioner also alleges that the charging document is insufficient because it does not specifically identify the material alleged to be obscene. The charging document refers to "indecent books, drawings, pamphlets, pictures, etc.". The trial transcript indicates that a sale took place wherein the magazine in question was sold to police authorities. Therefore, under Maryland Rule 728, Petitioner had a right to inspect at a reasonable time prior to trial, all of the items which were obtained by the police and which could or would be used in evidence against him. Therefore, Petitioner has had the means available to him to ascertain what, if any, evidence the prosecution authorities intended to use against him so as to prove an intent to sell obscene materials. Therefore, there would appear to be no prejudice to Petitioner in this respect. The essential purpose to be kept in mind in charging a defendant with criminal conduct is "two-fold, that is the charge must so characterize the crime and describe the particular offense 'as to put the accused on notice of what he is called upon to defend and to prevent a future prosecution for the same offense'. *Gray v. State*, 216 Md. 410, 415 [1958]" *Lank v. State*, 219 Md. 433 (1959), at page 436. The following quotation from *Hamling v. United States*, ___ U.S. ___, 94 S. Ct. 2887 (1974), at page 2907, is particularly applicable:

> "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or am-

> biguity, set forth all the elements necessary to constitute the offense intended to be punished.'" (Citing, *inter alia, United States v. Carll,* 105 U.S. 611 (1882).)

Respondent also asserts that the word "etc." does not render the charging document defective and merely is a generic term to indicate materials which were likened to previously referred to books, drawings, pamphlets and pictures. Because the magazine falls within the category of books, the addition of "etc." does not affect the validity of the charging document.

Therefore, the charging document was sufficient to charge Petitioner of the crime of which he was convicted.

II.

THE PROHIBITIONS OF ARTICLE 27, SECTION 418, ARE NOT VAGUE AND OVER-BROAD SO AS TO UNDULY RESTRICT PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF EXPRESSION.

Petitioner maintains that Article 27, Section 418, is vague, over-board and constitutes a prior restraint contrary to the First Amendment of the United States Constitution. Section 418, of Article 27, provides as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Respondent respectfully submits that "obscene" does not have a vague or over-board meaning and is adequately defined under existing Maryland statutes and case law. The opinion of the Court of Special Appeals of

Maryland in *Ebert v. Maryland State Board of Censors*, 19 Md. App. 300 (1973), holds that it is not necessary that the individual states desiring to regulate obscene material now enact new statutes (in light of *Miller v. California*, 413 U.S. 15 (1973), and the accompanying cases). *Ebert* points out that existing statutes as construed before *Miller*, or thereafter, may well be adequate. As that Court said in *Village Books, Inc. v. State*, ___ Md. App. ___, 323 A.2d 698 (1974), at page 701:

> "What we did in *Ebert* with respect to Code [Maryland], Article 66A, and what we do in this opinion with regard to Code, Article 27, Section 418 and Section 418A, is to follow the dictates of the Supreme Court as to the basic guidelines for the trier of fact under the reformulated test for the determination of obscenity announced in *Miller*."

See also *Woodruff v. State*, 11 Md. App. 202, 205 (1971), wherein the Maryland Court of Special Appeals points out that the Maryland courts, trial and appellate, are bound by the definition of obscenity as enunciated by the Supreme Court of the United States, and that the Maryland Legislature intended to use the word "obscene" to mean that which the word "obscene" means in the prevailing leading legal thought. Hence, Maryland case law defines "obscene" as it is defined by the United States Supreme Court. *Ebert* sets out "basic guidelines" for the trier of fact in determining whether contested materials are obscene. They are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, * * *,
>
> "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

> "(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, ___ U.S. at ___, 93 S. Ct. at 2615 *(citations omitted)*.

Thus, Section 418 is not vague or over-broad. Nor does the statute constitute a prior restraint in light of *Miller* as interpreted by *Ebert* so long as there is present the "patently offensive 'hard-core' sexual conduct" specifically defined by Maryland case law.

Petitioner also alleges that Section 418 fails to define hard-core sexual conduct. Respondent would direct this Honorable Court's attention to *Ebert, supra:*

> "Existing state statutes 'as construed heretofore or hereafter, may well be adequate'." Citing *Miller*, page 2615.

Ebert further points out that the Supreme Court made clear that the applicable state statute may contain the required definitions either as written or "authoritatively construed". Although the *Ebert* opinion dealt with the approval of films by the Maryland State Censor Board under the licensing regulations of Article 66A, the holding still defines obscenity under Maryland law in light of *Miller*. The Board may disapprove any film, applying the standards under the definition set out as per *Ebert*. See especially *Hamling, supra, Village Books, Inc., supra,* and *Jenkins v. Georgia,* ___ U.S. ___, 94 S. Ct. 2750 (1974).

Respondent would emphasize that Petitioner has in no way shown a conflict between Maryland case law and the Supreme Court decisions in *Miller* (and its siblings), or *Hamling* or *Jenkins*. Therefore, Section 418, as construed by Maryland case law, with the backdrop of *Miller*, does specifically define the obscene material which it prohibits.

Petitioner also maintains that there was no usable definition of obscenity at the time of the trial (October 29, 1973 and November 30, 1973), and that the judicial interpretation given Section 418 at the time of trial could not be retroactive so as to apply to the offense at bar. The *Miller* case was decided June 21, 1973, and the offense at bar was alleged to have taken place on June 26, 1973. The answer to Petitioner's contention in this regard is that since the *Miller* case preceded the offense, the guidelines set forth in *Miller* (as repeated in *Ebert*) would therefore apply to the offense at bar and to give ample notice to the offender; nor was Section 418 without prior case law interpretation. See *Village Books v. Marshall*, 263 Md. 76, (1971) re-aff'd by the Maryland Court of Appeals in 269 Md. 748 (1973) after being vacated by this Court in 413 U.S. 911 (1973).

III.

PETITIONER WAS NOT DENIED THE RIGHT TO A JURY TRIAL IN THE PRESENT CASE WHERE MARYLAND LAW PRECLUDED THE JUDGE SITTING IN THE CRIMINAL COURT OF BALTIMORE FROM SENTENCING PETITIONER TO ANY MORE THAN THE ONE HUNDRED DOLLAR FINE (AND COSTS), WHICH PENALTY HAD BEEN IMPOSED AT THE DISTRICT COURT LEVEL.

Petitioner maintains that he was entitled to a jury trial when he requested same at the Criminal Court of Baltimore level below. According to Petitioner, Judge Harris denied his request for a jury trial because the sentence below (one hundred dollars and costs) was less than the requisite six months or more sentence which would have entitled him to a jury trial. Additionally, Judge Harris imposed the same sentence at the Supreme Bench level as had been imposed at the District Court level.

Respondent respectfully asserts that Judge Harris was correct in his denial of Petitioner's request for a jury trial. It is clear that had Petitioner been subject to a sentence of six months or more, he would have had the right to a jury trial. See *Baldwin v. New York,* 399 U.S. 66, 69 (1970). However, when Petitioner appeared before Judge Harris on his appeal, which entitled him to a trial *de novo,* Judge Harris indicated that he was denying the jury trial since the penalty imposed in the District Court was a one hundred dollar fine and costs and hence he was of the opinion that he could not increase the sentence. Judge Harris denied the request for a jury trial because he was precluded from increasing the penalty beyond a six months period, which would have entitled Petitioner to a jury trial. See Maryland Code Article 27, Section 424, which provides a maximum penalty of one year and one thousand dollars. Additionally, Section 424 provides that a subsequent violation is subject to incur a maximum of five years and a five thousand dollar fine.

An analogous situation occurred in *State v. Roll and Scholl,* 267 Md. 714 (1973), wherein two contemnors had been sentenced in contempt proceedings each to sentences of four months and sixteen days. The Court of Appeals, in remanding the cases for further proceedings, pointed out that if each individual were later to be found in criminal contempt, the sentence imposed could not exceed the originally imposed four months and sixteen days. The Court of Appeals referred to *North Carolina v. Pearce,* 395 U.S. 711 (1969), which held that when a conviction is reversed and a person tried a second time, he may not receive a greater sentence than was imposed at the first trial unless there affirmatively appears identifiable conduct on the part of the defendant occurring after the time of the original

sentencing. See also *Moon v. Maryland,* 398 U.S. 319 (1970). Therefore, in the present situation, as there apparently existed no new reasons why Judge Harris might impose a harsher sentence than was imposed at the District Court level, Judge Harris could only impose the previously imposed sentence below, which sentence was below the six months threshold in *Baldwin.*

Nor is there any merit in Petitioner's contention that if Petitioner were subsequently convicted of the same offense, he would be subject to a possible five years imprisonment and a fine of five thousand dollars. At the time Petitioner appeared before Judge Harris, as is pointed out above, he was subject only to a fine of one hundred dollars and costs, and Petitioner was in no way subject at that time to a greater penalty than that imposed at the District Court level. The possibility that future conduct by the Petitioner might, coupled with the conviction at bar, subject him to a possible penalty of five years and five thousand dollars, was not a reality at the time he appeared before Judge Harris, and hence he was not subject to the five year term and five thousand dollar penalty.

Therefore, Respondent would emphasize that there is no substantial federal question, nor is there a conflict between the application of Maryland law and existing constitutional law.

IV.

THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED WHICH EXEMPTED FROM PROSECUTION CERTAIN PERSONS, SUCH AS EMPLOYEES OF THEATRES, DID NOT DENY HIM EQUAL PROTECTION OF THE LAWS.

Respondent would first call this Honorable Court's attention to the fact that although Petitioner appears to

have raised this issue in the Criminal Court of Baltimore (see Petitioner's Appendix at pages A3 and A5), he did not present this issue to the Maryland Court of Special Appeals or to the Maryland Court of Appeals when he sought review by way of certiorari to those courts. Hence, the matter is not reviewable by the Supreme Court of the United States as Petitioner has not preserved this issue in that he has not given the Maryland appellate courts an opportunity to decide same.

Petitioner has reference to Maryland Code Section 417, whereby, in effect, motion picture theatre employees who are not officers of a theatre and have no financial interest therein, are exempt from prosecution under Section 418. Petitioner also makes reference to Section 423, which exempts from prosecution certain *bona fide* scientific, educational and governmental institutions. The exemption for *bona fide* governmental, scientific and educational institutions is so clearly distinguishable from Petitioner's situation, wherein none of these defenses were shown, that little comment is called for. Additionally, Petitioner in no way below showed that the Maryland Legislature had no rational basis to distinguish employees of theatres from persons in Petitioner's position who are selling certain materials in stores.

Again, Petitioner has shown no substantial federal question, nor has he shown a conflict between Maryland law and constitutional law as espoused by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Criminal Court of Baltimore should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of October, 1974, I served a copy of Brief in Opposition to Petition for Writ of Certiorari in the above entitled case, by depositing same in the United States mail, postage prepaid, to

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